

TO: Central Valley Flood Protection Board

FROM: Joint Powers Agency Subcommittee

SUBJECT:

- 1) Report of Subcommittee Deliberations Regarding: Indemnification and Maintenance Assurances to be Furnished by a Joint Powers Agency (JPA) Acting as the Local Sponsor for Improvements to the Federal/State Flood Control System
- 2) Proposed Resolution for Central Valley Flood Protection Board Consideration and Adoption Addressing: Indemnification and Maintenance Assurances to be Furnished by a Joint Powers Agency (JPA) Acting as the Local Sponsor for Improvements to the Federal/State Flood Control System

BACKGROUND

Early in 2005, the Reclamation Board (Board) required Yuba County and RD 784, the members of the Three Rivers Levee Improvement Authority (TRLIA) Joint Powers Agency (JPA) to execute, along with TRLIA, an agreement imposing building permit and subdivision map constraints on Yuba County and indemnifying the State from all liability in connection with a permit for flood improvements to the State/Federal project in the vicinity of the confluence of the Feather and Bear Rivers. In subsequent related permits and agreements, the TRLIA member agencies have requested that the Board (presently the Central Valley Flood Protection Board) adopt a uniform policy to be applied to all JPAs as to whether member agencies of a JPA are to be required to indemnify the State by executing such agreements.

As the non-federal sponsor of these projects, the Board has provided maintenance assurances and indemnification to the Federal Government; and California law requires that the Board obtain similar assurances and indemnification from local sponsors when permitting modifications to the projects. In the past, it has not been the practice of the Board to require additional assurances from individual members of a JPA, although as noted above, at times, required such assurances.

At its January 16, 2009, meeting, the Board decided to form a subcommittee to consider indemnification requirements for JPAs and their member agencies. The subcommittee was tasked to consider circumstances, if any, meriting additional "hold harmless" promises or assurances from individual members of the JPA when a JPA serves as a local sponsor seeking approval from the Board for modifications to the Sacramento River Flood Control Project and/or the San Joaquin River and Tributaries Project (Projects). The Subcommittee was composed of the following Board members: Vice President Francis "Butch" Hodgkins; Secretary Maureen "Lady Bug" Doherty, Ms. Teri Rie, and Ms. Emma Suárez. Ms. Suárez served as the Subcommittee chair.

Three workshops were held by the Subcommittee, and all were attended by representatives of affected JPAs and their member agencies. During the first meeting, on February 13, 2009, the group was briefed on various legal theories relevant to the Subcommittee's deliberations: (1) if a joint powers agreement provides that the obligations of the JPA will not be those of the members, the individual members will not be liable for the contractual obligations of the JPA or inverse condemnation liabilities during the existence of the JPA; (2) tort obligations of the JPA are obligations of the members due to Government Code section 895.2; (3) following dissolution of a JPA, its members do not become liable for the contractual obligations of the JPA, although they probably remain liable for torts of the JPA or an individual member; (4) it is unclear, based on current case law, how the courts would treat inverse condemnation liability after the dissolution of the JPA.

From the February 13 meeting, a general consensus emerged that: (1) attempts to develop a policy instituting broad legal liability obligations on JPAs may be burdensome, unproductive, and, at times, unnecessary; and (2) the JPA member responsible for operation and management activities (O&M) should sign the assurance agreement to agree to provide O&M and to offer to hold the State harmless from consequences of improper O&M. Left to discuss at a second meeting was whether the Board should require *some or all of the remaining individual members* of the JPA to sign assurance agreements with the Board.

The March 13, 2009 meeting considered various approaches to dealing with individual JPA members, including the development by the Board of a series of factors that would be considered before JPA members are required to provide additional assurances. At the suggestion of Mr. Hodgkins, the Subcommittee focused on two key policy and legal concerns:

- Ensuring that some entity besides the State of California stand ready, in perpetuity, to ensure the O&M is appropriately done;
- In the case that O&M is not appropriately done in perpetuity, any liability that arises from this breach be covered by an entity other than the State of California, *even after the JPA has been dissolved but its individual members continue to benefit from the project's protections.*

The remainder of the March 13 meeting focused on the vetting components of a policy addressing the issue of perpetual O&M assurances by a JPA, where one of its members has already provided such assurances to the Board.

The Subcommittee convened on April 9, 2009 for its last meeting to consider a draft resolution by Mr. Hodgkins. The draft resolution would establish as the policy of the board that:

- JPAs must assure the State O&M of JPA-sponsored, Board-approved projects will be appropriately done in perpetuity

- JPA O&M assurances can take various forms, including proof that the JPA agreements (which govern the operations and obligations of a JPA) include language: (1) guaranteeing the existence of the JPA in perpetuity; or (2) promises by member agencies of the JPA that they will provide O&M and indemnification prior to the dissolution of the JPA

The Subcommittee discussed the draft resolution and asked the public for input. Based on these deliberations, the Subcommittee unanimously agreed to recommend the Central Valley Flood Protection Board adopt the proposed Resolution 09-17 (copy attached).

ADDITIONAL BACKGROUND

There are currently five JPAs engaged in flood management activities in the Central Valley, as identified in Table 1 following.

Joint Powers Agency Name	Member Agencies
Sutter Butte Flood Control Agency (SBFCA)	Counties of Butte and Sutter Cities of Yuba, Gridley, and Live Oak Levee Districts 1 and 9
Three Rivers Levee Improvement Authority (TRLIA)	Yuba County RD 784
Sacramento Area Flood Control Agency (SAFCA)	Counties of Sacramento and Sutter City of Sacramento American River Flood Control District RD 1000
West Sacramento Area Flood Control Agency (WSACFA)	City of West Sacramento RDs 537 and 900
San Joaquin Area Flood Control Agency (SJAFCA)	San Joaquin County City of Stockton

Each JPA has significant urban area within its jurisdiction and is seeking to reduce flood risk in those areas. Because urban areas contain most of the damageable property in the Central Valley, they present the highest risk of financial liability for tort and inverse condemnation claims in the event of flooding.

The Subcommittee found that the JPAs have demonstrated their effectiveness in reducing flood risk in the Central Valley. They provide a means by which the myriad of local agencies concerned about public safety can work together as a single policy body in developing and implementing regional flood damage reduction programs.

The Subcommittee further found that the JPA agreements for TRLIA, SAFCA, and WSAFCA include language providing that the member agencies are not liable for the obligations of the JPA, while the agreements for SBFCA and SJAFCA have not yet been reviewed. According to testimony received during workshops, such a provision seems to insulate the member agencies from the JPA's contractual obligations. The

member agencies remain, however, liable in tort, under Government Code section 895.2.

Given the recent inverse condemnation judgment of nearly \$500,000,000 for property damage resulting from flooding in the Linda area, the Subcommittee heard testimony from member agencies regarding their desire to be protected from JPA obligations and liabilities. However, State law requires that the Board secure assurances of maintenance and indemnification from an agency who receives a permit to construct modifications to a flood control project for which the Board provided similar assurances to the Federal Government. For practical purposes, this requirement applies to any work on a flood management improvement under the Board's jurisdiction.

The Subcommittee agreed JPAs are an important and effective flood management tool. The record indicates requiring indemnification from JPA member agencies for liability not arising from operation and maintenance would place a potential financial burden on those agencies that could exceed their financial capability. It would have a chilling effect on the effectiveness of existing JPAs and likely preclude the formation of new JPAs. In the Subcommittee's opinion, the resultant adverse effect on the State's efforts to improve public safety would be much greater than any perceived financial benefit of the liability shift. Consequently, the Subcommittee recommends the Central Valley Flood Protection Board not require indemnification from the member agencies of a JPA for liability not arising from operation and maintenance.

The Subcommittee concluded that public safety could be improved by altering the Board's practice regarding maintenance assurances. Currently, the Board accepts maintenance assurances from existing local maintaining agencies (LMAs) even when those assurances are for maintaining major regional improvements initiated by a JPA. The Subcommittee found the LMAs provide effective maintenance, but remained concerned about their financial capability. Furthermore, the Subcommittee heard about the new maintenance challenges that are on the horizon, and how LMAs will need the assistance of JPA members in meeting those challenges.

The Subcommittee also heard how, since Katrina, the U.S. Corps of Engineers (Corps) has renewed and strengthened its program of levee inspection. The purpose of the Corps' program is to determine if the LMAs are maintaining federally funded flood improvements in conformance with Corps standards. Under the Corps' renewed effort, more emphasis is focused on vegetation and encroachments. In urban areas, the removal of trees and unsafe encroachments can become extremely controversial and is best accomplished by the cooperative action of local land use agencies, LMAs, and the Board.

Finally, the 2007 legislative overhaul of California flood control law requires urban areas to achieve protection from floods with a 0.5 percent chance of occurrence in any year and the development of a comprehensive Central Valley Flood Protection Plan. The more robust facilities required to meet these mandates will require more sophisticated and more costly maintenance.

For all of these reasons, the Subcommittee found the Board was justified in requiring that JPAs provide perpetual maintenance assurances and indemnification for liability arising from O&M for JPA projects. JPAs can delegate maintenance performance to existing LMAs, and the JPA's assurance would only come into effect if the LMA was unable to perform maintenance per State/Corps standards. Proof of such assurances can take various forms, including a satisfactory showing by the JPA that the JPA's agreement establishes that: (1) the JPA will not be dissolved as long as the maintenance assurance is in effect, or (2) the member agencies will provide maintenance assurances acceptable to the Board before dissolving the JPA.

RECOMMENDATION

The Subcommittee respectfully recommends approval of Resolution No. 09-17 establishing:

- A policy that indemnification and maintenance assurances must be furnished by a Joint Powers Agency (JPA) acting as the local sponsor for improvements to the Federal/State Flood Control System; and
- Requirements associated with this policy.

**STATE OF CALIFORNIA
CALIFORNIA NATURAL RESOURCES AGENCY
CENTRAL VALLEY FLOOD PROTECTION BOARD
RESOLUTION NO. 09-17**

RESOLUTION REGARDING INDEMNIFICATION AND MAINTENANCE ASSURANCES TO BE FURNISHED BY A JOINT POWERS AGENCY (JPA) ACTING AS THE LOCAL SPONSOR FOR IMPROVEMENTS TO THE FEDERAL/STATE FLOOD CONTROL SYSTEM

WHEREAS, the Central Valley Flood Protection Board (Board) is the non-federal sponsor for the Sacramento River Flood Control Project and the San Joaquin River and Tributaries Project (Projects); and

WHEREAS, the Board has provided maintenance assurances and indemnification to the Federal Government in connection with those projects; and

WHEREAS, California law requires that the Board obtain similar assurances and indemnification from local sponsors when permitting modifications to the Projects; and

WHEREAS, currently five joint powers agencies (JPAs) have been formed for the purpose of improving flood safety in urban regions of the Central Valley and serve as the local sponsor for improvements to the Projects; and

WHEREAS, the Subcommittee further found that the JPA agreements for TRLIA, SAFCA, and WSAFCA include language providing that the member agencies are not liable for the obligations of the JPA, while the agreements for SBFCA and SJAFCA have not yet been reviewed; and

WHEREAS, each JPA has significant urban area within its jurisdiction and is seeking to reduce flood risk in those areas; and

WHEREAS, the JPAs have demonstrated their effectiveness in advancing public safety by providing a single policy body that enables multiple local public agencies involved in flood management activities to work collaboratively in developing and implementing regional flood management plans; and

WHEREAS, regional flood management plans benefit the State by reducing flood risk and improving flood readiness for residents of major flood plains in the Central Valley; and

WHEREAS, the Board formed a fact-finding subcommittee to develop a policy recommendation as to how the Board should secure indemnification from a JPA; and

WHEREAS, the Subcommittee found that a greater financial capability for the State could be secured by spreading the indemnification obligation beyond the JPA to the member agencies, but this would have a chilling effect on the continued effectiveness of existing JPAs and likely preclude the formation of new JPAs; and

WHEREAS, the Board agrees with the Subcommittee's conclusion that the perceived financial benefits from further spreading indemnity obligations to JPA member agencies beyond those currently required by law does not justify the resultant adverse effect on the State's efforts to improve public safety for the residents of Central Valley floodplains; and

WHEREAS, the Subcommittee found that if a JPA dissolves, its individual members will continue to benefit from the JPA's authorized flood control projects; and

WHEREAS, the Subcommittee found that it is in the best interest of the State to ensure that some entity other than the State shall ensure that operation and maintenance will be appropriately done in perpetuity, and if not appropriately done, that any liability which arises from this failure should be the responsibility of an entity other than the State; and

WHEREAS, the Subcommittee found that the need to ensure perpetual operation and maintenance and operation and maintenance indemnification is particularly important when JPA formation agreements do not address how operation and maintenance will be covered once the JPA dissolves and in areas that have been heavily urbanized; and

WHEREAS, the Subcommittee found that it is appropriate to require assurances and indemnification to ensure perpetual operation and maintenance in the event a JPA dissolves, but that this requirement could be met through language in the JPA formation agreement; and

WHEREAS, JPAs can delegate maintenance performance to existing LMAs and the JPA's assurance would only come in effect if the local maintaining agency (LMA) was unable to perform maintenance per State/U.S. Army Corps of Engineers standards; and

WHEREAS, the Board agrees with the Subcommittee's conclusion that the most effective maintenance program will be one which is supported by all member agencies of the JPA that developed the plan for the improvements requiring maintenance; and

WHEREAS, the Board agrees with the Subcommittee's conclusion that assurances and indemnification are needed to ensure perpetual operation and maintenance of flood control projects in the event a JPA dissolves, and that these requirements can be met through language in the JPA formation agreement.

NOW, THEREFORE, BE IT RESOLVED BY THE CENTRAL VALLEY FLOOD PROTECTION BOARD THAT:

Hence forth, agreements between the Central Valley Flood Protection Board and a Joint Powers Agency will comply with the following policy:

1. The Central Valley Flood Protection Board will accept indemnification from a Joint Powers Agency without requiring that the resulting obligation be spread to the member agencies of the Joint Powers Agency beyond that currently provided by law.

2. When a JPA serves as the local sponsor for a flood control improvement requiring a Board permit or other form of Board Approval, the Central Valley Flood Protection Board will require that the JPA furnish operation and maintenance assurances for the project and indemnify the State and federal governments from liability arising from that operation and maintenance. In order to meet this requirement, the JPA agreement shall provide in language acceptable to the Board:
 - i. That the JPA will not be dissolved so long as the JPA has made outstanding commitments to the Board for operation and maintenance and operation and maintenance indemnification; or
 - ii. That the member agencies will provide the foregoing maintenance assurances and indemnification prior to the JPA dissolving; or
 - iii. Such other agreements or assurances as may be acceptable to the Board.

This requirement is not intended to alter existing or future LMA maintenance responsibilities and JPAs may delegate maintenance obligations as they see fit. The Board intends to invoke the JPA maintenance assurance if LMAs are not performing maintenance in compliance with State and Federal standards and before it considers approval of a State Maintenance Area. The Board may insert a permit term to effectuate this policy.

PASSED AND ADOPTED by vote of the Board on _____, 2009

Benjamin F. Carter
Board President

Maureen "Lady Bug" Doherty
Board Secretary